(1) Supreme Court, U.S.
FILED

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No. _____

# In The
# Supreme Court of the United States

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MING-CHIANG LI

Petitioner

*versus*

JOHN H. DALTON, Secretary of Navy
DEPARTMENT OF NAVY

Respondents

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On Petition For Writs Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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## PETITION FOR WRIT OF CERTIORARI

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37PP

## QUESTION PRESENTED FOR REVIEW

Whether the District court should not draw all reasonable inferences in favor of Chinese American Plaintiff-non-moving party in summary judgment.

Whether material facts provided by Chinese American Plaintiff are not genuine, but are speculations or compilation of interferences?

Whether the summary judgment should be granted to moving party of white Defendants base on their inconsistent, contradictory, or false explanations which the jury is not required to believe?

Whether young white American should be promoted due to highly competitive nature, but old Chinese American should not?

Whether, in a defense research laboratory, a Chinese American scientist whose discoveries revolutionized electronic warfare technologies is unsuccessful in his performance?

Whether it is legitimate to deprive a Chinese American scientist's right to conduct research as defined in his employment contract?

Whether it is legitimate to force a Chinese American employee in performing duties and responsibilities at GM-14 level and to pay him at GM-13 level?

Whether it is legitimate to set up endless reports, numerous dead lines, and traps as retaliations against EEO complaints and in framing a Chinese American for removal?

Whether it is legitimate to evaluate a Chinese American not on the merit, but according to supervisor's perception and a single element which have not been imposed on white American?

## LIST OF PARTIES

THE FOURTH CIRCUIT No.: 99-1943

*Petitioner-Plaintiff*: Ming-Chiang Li,

*Respondents-Defendants:* John H. Dalton, and Department of Navy.

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## PETITION FOR WRIT OF CERTIORARI

The petitioner, Ming-Chiang Li, respectfully petitions This Honorable Court to issue writs of certiorari to the United States Court of Appeals for the Fourth Circuit.

## REFERENCE TO REPORTS OF OPINIONS

The unpublished decision (No. 99-1943) of the Fourth Circuit Court of Appeals was filed on May 12, 2000 (App. A - 1). Petitioner's petition for rehearing and /or rehearing en banc was filed on Monday, June 26, 2000 through certified mail (45 days). Although it was timely, the Fourth Circuit claimed that the filing was untimely and denied the petition on June 29, 2000 (App. A - 2). The memorandum opinion (No. AW 97-3651) from the District Court of Maryland Southern Division was filed on July 26, 1999 (App. A - 3).

## JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C.§ 1254(1)

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: No person shall ... be deprived of life, liberty, or property, without due process of law....

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: Nor deny to any person ... the equal protection of law.

As proscribed by Title VII of the Civil Rights Act of 1964, as mended 42 U.S.C. § 2000, et seq., it should be an

unlawful practice under the Constitutional Equal Protection Clause for employment discrimination on the basis of race, color, religion, sex, or national origin.

As proscribed by the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621, et seq., it should be an unlawful practice under the Constitutional Equal Protection Clause for employment discrimination based upon age.

## STATEMENT OF THE CASES

This is one of many cases of discrimination against accomplished Chinese American scientists in defense organizations. A current and well publicized case is against Dr. Wen Ho Lee as an espionage suspect. He is now in solitary confinement and facing the threat of life in prison. Another well known case is against Dr. Tsien Hsue-Shen, a brilliant Chinese immigrant who worked on top-secret U.S. defense projects during World War II, only to be hounded out of the United States in 1955. Plaintiff Dr. Ming-Chiang Li was born on June 18, 1935, is Chinese American, and a citizen of the United States of America. His discoveries have led to revolutionary electronic warfare technologies, which are now referred to as Generation-X electronic countermeasure technologies. It would take 25 years of threat system evolution to defeat such new countermeasures. What has Plaintiff gotten from his exceptional contributions to national security and defense? He was forced out from Naval Research Laboratory (NRL) on October 1994 and has been unemployed since.

Plaintiff graduated from Beijing University, came to the United States in 1962, received his Ph. D. from University of Maryland in 1965, obtained his post doctoral training under Nobel Laureate Prof.

Chen-Ning Yang at the Institute for Advanced Study in Princeton, NJ headed by Prof. Robert Oppenheimer (father of atomic bomb), and became a professor at Virginia Polytechnic Institute and State University in 1967.

Due to his family situation, after 17 years of university teaching, in 1984 Plaintiff became a GM-13 scientist in the Tactical Electronic Warfare Division, which was headed by witness John A. Montgomery, at Naval Research Laboratory to conduct peripheral research in supporting major electronic countermeasure projects. Witness Francis J. Klemm headed the Off-Board Countermeasure Branch at the Tactical Electronic Warfare Division.

During Operation Desert Storm of 1998, Defendants urgently needed a scientist to manage a radar test facility at Chesapeake Beach Detachment to support Operation Desert Storm. They offered a promoted GM-14 facility manager position to Plaintiff with rights to conduct defense critical research. Meanwhile Defendants' Witness Francis J. Klemm lured Plaintiff to temporarily accept a GM-13 scientist position at the test facility with no management and administrative responsibilities, and ordered Plaintiff to take the GM-14 facility manager responsibilities position immediately in March 1988.

The urgency of Operation Desert Storm forced Defendants to put their discrimination policies aside. Defendants awarded Plaintiff for his management achievement at the test facility and urged Plaintiff to propose his own defense critical countermeasure projects based on his past professional experience. Plaintiff proposed several defense critical proposals.

After Operation Desert Storm ended in the summer of 1990, Plaintiff became aware that the promise was a lie. Defendants would never promote him and fund his

proposals through internal funding. Plaintiff initiated an equal employment complaint.

Retaliation followed. Defendants forbade Plaintiff from participating in professional meetings, seeking external funding, and publishing his research accomplishments, and accused him of for misconduct. Furthermore, Defendants deprived him of the facility funds by transferring these funds to other groups headed by white males. On November 27, 1991, Defendants formalized their actions and issued an administrative order forbidding Plaintiff from engaging in any research activities, and confining his duties only to overseeing day-to-day operation of the test facility. Such an order directly disregarded Plaintiff's employment contract and GM-13 position description as a research scientist. Without research activities, Plaintiff would never be promoted as a scientist at NRL and his career was totally ruined. Furthermore, Defendants mobilized the administrative machinery to remove Plaintiff.

Defendants' witnesses lied repeatedly and perjured themselves under oath. To protect himself, Plaintiff submitted several invention disclosures based on his proposals. Defendants claimed that these disclosures were unpatentable and further claimed the Navy had no interest in them. Meanwhile, Defendants forbade Plaintiff to continue his efforts associated with these disclosures.

In the spring of 1994, Defendants were taking their final steps to remove Plaintiff. Plaintiff found that Defendants' witnesses Montgomery and Klemm took Plaintiff's proposal of tethered smart RF decoys for their own and were awarded a $14 million project called "EAGER".

Before the forbidden order of November 27, 1991, Plaintiff had the opportunity to visit various funding agencies for promulgating his disclosure. Many highly

classified defense critical projects followed. Now nearly ten years later, some of these classified projects have become known in public, including a billion dollar project called IDECM. The Defendants had lied in their claims that the Navy had no interest in Plaintiff's disclosures.

It is an undeniable fact that the discoveries contained in Plaintiff's disclosures were revolutionary. To justify their discriminatory actions, Defendants lied that Plaintiff's discoveries were not related to his position. Plaintiff initiated an administrative patent infringement case. To obtain royalty free license, Defendants reversed their lies and stated that the discoveries were related to Plaintiff's position. The jury would declared that Defendants lied whatever they wanted and the District orders were based on Defendants' lies.

The case of Plaintiff's forced resignation is still under administrative investigation The present Maryland case is on discrimination of promotion and reprisal actions prior to the date of February 4, 1993.

The original Maryland case included corruption claims against the individual defendants. The Maryland District Court declared that the corruption claims were still under administrative investigation and were not mature to bring to court. Furthermore, the Maryland District Court ordered the original allegation be amended to promotion discrimination and reprisal claims only.

Maryland District Courts entered summary judgments respectively in favor of Defendants on May 12, 2000.

## REASONS FOR GRANTING THE WRIT

A. The District Court of Maryland did not review all of the evidence in the record, and did not draw all reasonable inferences in favor of Plaintiff- non-moving party in summary judgment.

B. The District Court of Maryland played the role of jury by declaring evidence provided by Plaintiff as speculation or compilation of interferences in summary judgment.

C. The District Court of Maryland did not disregard Defendants' inconsistent, contradictory, and false explanations which the jury is not required to believe.

D. A Chinese American scientist whose discoveries revolutionized electronic warfare technologies is not unsuccessful in his performance.

E.. The District Court of Maryland disregarded Rule 26of discovery in preventing Plaintiff from obtaining relevant material.

F. Discrimination against Chinese Americans in defense organizations must stop.

## LAW HAS CHANGED

### Need Not Provide Direct Evidence

An unanimous Supreme Court lowered one legal barrier to successful job discrimination law suits on June 12, 2000 (*Roger Reeves v. Sanderson Plumbing Prod. Inc.*, 68 U.S.L.W. 4479), ruling that workers need not provide direct evidence that their employers intended to discriminate against them in hiring and promotion decisions. Rather, the Supreme Court said, workers in many cases must show only that an employer's explanation for a rejection or firing is false. Juries would be allowed to infer whether the real motive behind a decision was discrimination, the Supreme Court ruled.

Plaintiff had presented extensive evidence that Defendants' explanations were false. Plaintiff alleged that Defendants denied his right as a scientist to conduct research and also to receive awards for his accomplishments. Defendants claimed that these complaints do not stem from discrimination. Promotions

and awards for a scientist in NRL were based on his scientific accomplishments. By being denying his right to conduct research, Plaintiff as an older Chinese American would never be promoted. Therefore, Defendants' claim was false.

Defendants ordered Plaintiff to take over the GM-14 facility manager position in March 1988, and refused to complete the paper work necessary to formalize the position. Defendants claimed that the facility manager position was never created. Defendants' claim was false. Plaintiff's position description of GM-13 Scientist did not fit his position at the test facility. Hence the Maryland District Court's claim, that Plaintiff could not produce any evidence to establish a prima facie case of failure to promote for his first allegation, could not stand.

Defendants claimed that because promotions were highly competitive, Plaintiff was not able to receive one of the few promotions granted. Yet those who were promoted were disproportionately young white males. NRL promotes professional personnel according to the intrinsic value of their scientific and technical accomplishments. During the interrogations, Defendants refused to produce documents that those promoted young white males had higher intrinsic value of accomplishments than Plaintiff. Furthermore, Defendants claimed that intrinsic value is vague, which is in contradiction to NRL's policy of promotion. Defendants' claim was false.

Defendants claimed that Plaintiff was not similarly situated to those promoted. In contradiction, Defendants put Plaintiff's name on the same promotion priority lists, but with his rank much lower than those promoted young white males. If Plaintiff was not similarly situated, his name should not have been put on these promotion priority lists for comparison. Only those similarly situated can be compared. Again, Defendants' claims

were false. Hence the Maryland District Court's claim, that Plaintiff could not produce any evidence to rebut the reason of highly competitive nature, could not stand.

Plaintiff's temporary position was as a scientist who had no administrative or facility management duties or responsibilities. A temporary scientist position and a facility manager position are entirely different. Defendants claimed that these two positions were similar. Defendants' claim was false.

Before Plaintiff's arrival on the site, the facility manager was a technician, who had no responsibilities for defense critical research. By denying Plaintiff's right to conduct research, Plaintiff's function at the test facility was the same as that of a technician. Defendants claimed they did not downgrade Plaintiff to a technician by denying his rights as a scientist. Defendants' claim was false.

To set up Plaintiff for removal, Defendants assigned Plaintiff only to management duties and responsibilities with specific details, and set up endless reports, numerous deadlines, and traps. According to Plaintiff's position description, his assignments should have been given only in broad and general terms. Defendants claimed that assignments with specific details were required by his position. Defendants' claim was false.

Defendants withheld payment for services which the facility provided to other groups, gave facility funds to groups headed by white males, manufactured financial problems at the test facility, and deliberately created accounting and administrative confusions. Defendants claimed that Plaintiff repeatedly failed to provide information required and did not exhibit knowledge and understanding on financial situations of his own organization. Defendants' claim was false.

Defendants' witness Montgomery in his affidavits claimed that he gave a position to a white male, because

Plaintiff had no demonstrated expertise and could not perform the function in advanced ESM research and development. If Plaintiff had no demonstrated expertise in advanced ESM systems, then he would not have discovered Generation - X systems, which is an advanced ESM system. Furthermore, from 1971 to present, the Navy has filed more than 12,000 patents, but has determined that the said white male's research and development work is not worthy to be protected by a single patent. The white male did not have any revolutionary discovery and his expertise in ESM could not be compared with that of Plaintiff. Witness Montgomery's claim was false.

Defendants' witness Klemm in his affidavits claimed that he gave a position to a white male, because Plaintiff had no demonstrated experience in active electronic decoy research and development, nor in advanced RF systems. Smart RF decoys are active electronic decoys. Threat assessment methods are advanced RF systems. Both smart RF decoys and threat assessment methods were discovered by Plaintiff. Navy will deploy these decoys and methods in the new millennium. No evidence has shown that the Navy has or will have deployed any discovery by this white male. The white male's expertise in active electronic decoys and RF systems could not exceed that of Plaintiff's. Witness Klemm's claim was false.

Plaintiff has shown that Defendants' explanations in their claims were false. A jury could infer from false explanations whether or not the real motive behind a decision was discrimination. The summary judgments on the present cases bypassed juries, were in contradiction with the recent Supreme Court ruling, and must be reversed.

**Prima Facie and Dishonesty**

The Supreme Court ruled that a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination.

The District Court could not deny that Plaintiff can establish a prima facie case of discrimination for promotion through merit. Plaintiff had submitted solid evidence that Defendants' witnesses consistently perjured themselves in testimony. Plaintiff had cited several Defendants' lies in preceding sections and will cite more.

According to NRL policy, each employee's position description must be accurate, and employee's assignments must based on his or her position description. Defendants' witnesses Montgomery and Klemm only assigned Plaintiff with management and administrative duties and responsibilities, which were not based on his scientist position description. They testified that Plaintiff's position description was accurate. A reasonable fact finder would conclude that Defendants' witnesses Montgomery and Klemm were dishonest, and they perjured themselves.

Defendants' witness Montgomery, testifying under oath during the administrative hearing, made these statements concerning Plaintiff's tethered decoy:

> "The simple bottom line is this: As a consequence of that, it would be ineffective against the threats it was intended to deal with, so it wouldn't be useful. It would be ineffective."

On the contrary, Defendants' witness Montgomery took Plaintiff's tethered decoy discovery as his own to get awards. The jury would declare that he perjured himself.

Defendants' witness Montgomery testified under oath during an interview with an EEO counselor:

"Typically senior scientists (such as Plaintiff) spend a significant fraction of their time marketing the service of their organization to potential users or sponsors. However, Plaintiff is not performing this function."

This testimony is in direct contradiction to Defendants' witness Klemm's order, dated November 27, 1991, that Plaintiff's efforts should be only towards day-to-day operations, and not independently charging off. The jury would declare that Defendants' witness Montgomery perjured himself again.

Defendants' witness Klemm testified that Plaintiff's discoveries were "pie-in-the-sky", to prevent him from successfully seeking external funding. On the contrary, Defendants' witness Klemm took Plaintiff's discoveries as his own to garner awards for himself. The jury would declare that Defendants' witness Klemm perjured himself.

Defendants' witness Klemm, testifying under oath during the administrative hearing, made these statements concerning Plaintiff's assessment method:

"People recognize that Dr. Li (Plaintiff) had proposed the idea and the only way I can say it is the impression people had was Dr. Li no longer had any interest in it."

His testimony contradicted his order of November 27, 1991, in which he restricted Plaintiff from conducting further research activities, including the assessment method. The jury would declared that Defendants' witness Klemm again perjured himself.

Defendants' witness Klemm, testifying under oath during the administrative hearing, made these statements concerning Plaintiff's bistatic radar:

"Dr. Li's efforts were taking him towards developing new radar systems and new radar technologies, which are outside totally of the character of my branch and my division."

On the contrary, he allowed his younger white subordinates to develop new transportable step frequency radar, new coherent radar, and new bistatic radar. The jury would declared that Defendants' witness Klemm had yet again perjured himself.

The Supreme Court ruled that the court must review all of the evidence in the record for summary judgment, drawing all reasonable inference in favor of the non-moving party (*Roger Reeves v. Sanderson Plumbing Prod. Inc.*, 68 U.S.L.W. 4480). The Maryland District Court in reaching its summary judgment of the present case did not review the evidence provided by Plaintiff on Defendants' inconsistent, contradictory, and false explanations and perjuries, and did not draw all reasonable inference from the evidence. Furthermore, the District Court disregarded the evidence provided by Plaintiff and failed to draw all reasonable inference from the evidence in Plaintiff's favor. Hence, based on the new Supreme Court ruling, Defendants are not entitled to summary judgment as a matter of law, and the District Court's order in dismissing the present discrimination must be reversed.

As the Supreme Court also notes (*Roger Reeves v. Sanderson Plumbing Prod. Inc.*, 68 U.S.L.W. 4485), it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for his actions gives rise to a rational inference that the defendant could be masking his actual illegal motivation. Plaintiff had provided unequivocal evidence of the dishonesty of the Defendants to show that they were masking their illegal motivation. Summary judgements had deprived Plaintiff of his Constitutional Right of Equal Protection and must be reversed.

**Plaintiff's Evidence on Record**

The Supreme Court also ruled that the District Court must make no credibility determinations or weigh any evidence on record (*Roger Reeves v. Sanderson Plumbing Prod. Inc.*, 68 U.S.L.W. 4480). The Supreme Court further ruled that the credibility determinations or weighing any evidence, along with the drawing of legitimate inference from the facts, are for the jury, not the court to decide (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255).

Plaintiff had supplied significant evidence to dispute Defendants' explanations and to show Defendants' claims to be false. The Maryland District Court made the determination that these disputes were not genuine and the evidence provided by Plaintiff on record was speculation or compilation of inference. The Maryland District Court had played the role of jury, drawing inference from the facts, making credibility determinations, and weighing the evidence on record. The Maryland District Court had disregarded the Supreme Court ruling. Defendants are not entitled to summary judgment as a matter of law. The Maryland District Court's order in dismissing the present discrimination reprisal case must be reversed.

**Defendants' Testimonies**

The Supreme Court also ruled that the District Court must disregard all evidence favorable to the moving party that the jury is not required to believe (*Roger Reeves v. Sanderson Plumbing Prod. Inc.*, 68 U.S.L.W. 4480). A jury would not believe the dishonest claims made by the Defendants and their witnesses, who constantly perjured themselves in testimonies. The Maryland District Court did not disregard Defendants' proffered explanations as provided by them and their dishonest witnesses for their

actions against Plaintiff in promotion and reprisal. Instead, the Court used the proffered explanations as the foundation in reaching its summary judgment of the present case. The Maryland District Court had disregarded the new Supreme Court rulings. Defendants are not entitled to summary judgment as a matter of law, and the Maryland District Court's order in dismissing the present discrimination of promotion and reprisal case must be reversed.

## CONFLICT WITH A DECISION OF THE SUPREME COURT AND CONFLICTS NOT ADDRESSED

Plaintiff listed many genuine disputes in his reply to Defendants' summary judgment motion and appeal brief. The Supreme Court recently ruled (*Roger Reeves v. Sanderson Plumbing Prod. Inc.*, 68 U.S.L.W. 4480) that, for summary judgment under Rule 56, the Court must review all evidence in the record (*Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587), drawing all reasonable inference in favor of the non-moving party.

The Maryland District Court did not address any disputes as provided by Plaintiff, and did not draw all reasonable inference from these disputes in favor of the non-moving Plaintiff. The Fourth Circuit Appeal Court simply affirmed the judgment of the district court without a single word on any of these genuine disputes. Hence, the Maryland District Court's opinion is in conflict with the above Supreme Court ruling decision, and the Fourth Circuit Appeal Court did not address the conflict.

Plaintiff listed extensive evidence in his reply to Defendants' summary judgment motion and appeal brief. The Supreme Court recently ruled that, for summary judgment under Rule 56, the Court must make no credibility determination or weigh any evidence *(Lytle v.*

*Household Mfg., Inc.* 494 U.S. 545, 554-556). The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury to perform, not the court (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255). The Maryland District Court took over the role of jury and made credibility determination and weighed the evidence by declaring that Plaintiff's evidence was purely speculation and compilations of inferences. The District Court's opinion is in conflict with the above Supreme Court ruling decision, and the Appeal Court did not address the conflict.

## PROCEEDINGS INVOLVING ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE

The original suit contained both discrimination and corruption complaints. It was shown that individual defendants had cheated the government. After Maryland Court order, the original suit was divided into three cases. The second case is on Bivens' claims (District Court for the District Court of Columbia, Civil Action No.: 98-2719(TPJ)). The third case is Qui Tam violations (District Court of Virginia, Civil Action No. MC-00-03).

This is a classical case of discrimination against a Chinese American in preventing him from becoming a leader or an authority in defense critical technologies.

Depriving Fundamental Rights

When Plaintiff joined Naval Research Laboratory, he was assigned to conduct peripheral research in supporting major electronic countermeasure projects. During Operation Desert Storm Operation in 1998, Defendants urgently needed a scientist to manage a radar test facility at Chesapeake Beach to support Operation Desert Storm.

Plaintiff was very successful in managing the facility and in his independent research of critical importance. Plaintiff's success had alerted Defendants that Plaintiff would become a leader or an authority in defense critical technologies. Defendants immediately took action by reneging on their promise to change his grade and cutting the funding to the test facility. After Plaintiff's EEO complaints, Defendants escalated their actions of retaliation from restricting his research activities to totally depriving his right to conduct research.

Defendants' above actions were against Plaintiff's Constitutional rights. Plaintiff was determined to fight against the injustice and filed more EEO complaints. Defendants used their administrative power to cover up the injustice and discrimination with help from the Department of Justice. The case is now ten years old. Plaintiff's discoveries before the depriving order have since revolutionized the art of electronic warfare technologies.

Plaintiff stated during a hearing before the District Court of Maryland that Defendants had denied his right as a scientist to conduct research and had also denied him the recognition he should have received for his accomplishments. Defendants stated that these complaints did not stem from discrimination. The District Court of Maryland agreed with Defendants' statement. The agreement augmented the District Court's position, that it is legal to deny Plaintiff's basic right of research as a scientist in NRL.

According to the Supreme Court, a discriminatory abusive work environment can and often will keep employees from advancing in their careers *(Harris v. Forklift Sys. Inc.*. 5120 U.S. 22 (1993)). Without the ability to perform research, Plaintiff would never be promoted, and never be able to emerge as a leader or authority in defense critical technologies. His career was

ruined. Hence, the District Court's position is erroneous and in contradiction to the law in denying Plaintiff's reprisal claim. The position legalizes discrimination and reprisal. Hence, the Maryland District Court's position involves a question of exceptional importance.

Depriving Right of Discovery

Under Rule 26 on discovery, Plaintiff has the right to inquire into all information not otherwise available that is relevant to the subject matter of the present law action, whether or not the material would be admissible as proof.

During the discovery process, Justice Department lawyers made all attempts, including lying, to prevent Plaintiff from collecting relevant documents and evidence. The District Court of Maryland agreed with these lawyers. Some of the examples are stated here:

NRL promotes professional personnel according to their intrinsic value of accomplishment. Plaintiff requested Defendants to produce documents to show that those promoted white young males had higher intrinsic value of accomplishment than Plaintiff. Defendants claimed that intrinsic value is vague and refused to produce the documents. The District Court agreed with them.

Plaintiff requested Defendants to identify those individuals who were similarly situated to him in the administrative chain, and to produce relevant documents regarding their position description, Performance Management and recognition system, personal qualification statement, promotion nomination information, research and development projects, funding, publications, reports, and patent disclosures. These are relevant information to compare how Plaintiff was treated by Defendants in comparison with others. Except in identifying one individual and producing one position

description, Defendants refused to identify others and refused to produce all other requested documents. The District Court agreed.

Defendants used specially designed single element and supervisors' perception criteria to evaluate Plaintiff. According to the designed criteria, Defendants could evaluate Plaintiff in whatever manner they wished according to their perceptions. Plaintiff requested Defendants to produce documentation to show that the designed criteria have been imposed on white males. Defendants refused and the District Court agreed.

Barriers in the discovery process were created by the Justice Department lawyers and the District Court. Defendants succeeded in preventing Plaintiff from obtaining critical and relevant material and documents, which they possessed.

The Maryland District Court's position of agreeing with Defendants' actions in violating Rule 26 covered up the discrimination and reprisal against Plaintiff. Hence, the Maryland District Court's position involves a question of exceptional importance.

Arbitrary Court Decisions

The Maryland District Court disregarded evidence favorable to Plaintiff regarding Defendants' inconsistent, contradictory, or false explanations and testimonies. Furthermore the Maryland District Court played the role of jury, made credibility determinations, and weighed evidence provided by Plaintiff by declaring them as speculation and compilations of interferences in contradiction to Rule 56.

The Appeals Court for the Fourth Circuit declared Plaintiff's timely petition as untimely in rejecting his petition.

The above court decisions are in contradiction to the Constitution and Federal Rules of Civil Procedure. These

decisions mean that a Chinese American working in a defense organization is not protected by the Constitution. Hence, these decisions involve a question of exceptional importance.

## CONCLUSION

This case exemplifies a typical discrimination case against a Chinese American in a defense organization. It is not the only case in the Electronic Warfare Division of Naval Research Laboratory. In March 1991, a second Chinese American, who is an eminent leader in his own technical field, was forced to resign. The similarities in these two cases are not coincidental, and merely illustrate the gravity of discrimination against senior Chinese Americans in a defense agency.

Naval Research Laboratory used its administrative and management authority to retaliate against Plaintiff for filing his EEO complaints, and to cover up the discrimination through false statements and perjuries. These acts were supported by the Department of Justice as evidenced by its lawyers in defending the present cases.

Plaintiff has been fighting the present cases for ten years. It shows how hard and difficult his fight has been against discrimination. Not so many are willing to fight and persevere as long. Now the law has changed. Plaintiff hopes that justice will prevail.

The discrimination in defense organizations not only hurts the victims, but also hurts the nation's security and defense. Plaintiff has revolutionized electronic warfare technologies, and is capable of pushing these technologies to higher levels. Furthermore, with Plaintiff's expertise and leadership, he is equally capable of revolutionizing radar technologies as well.

Plaintiff has been in the United States for nearly forty years. In recent years, many Chinese have immigrated to this country. They have become one of the major forces in pushing the advancement of high technology. Some of them will become as professionally mature as Plaintiff and may move into defense organizations. The discrimination policies of defense organizations will prevent this movement from happening, and thus will weaken the nation's security.

Now the law has changed. Summary judgements in the present cases must be reversed. Plaintiff's constitutional rights must be restored. Remand the case for jury trial with a new discovery.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

Petitioner Ming-Chiang Li, pro se

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# APPENDIX

## UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

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No.: 99-1943

MING-CHIANG LI,
*Plaintiff-Appellant*

*v.*

JOHN H. DALTON, and
DEPARTMENT OF NAVY
Defendants-Appellees.

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Appeals from the United States District Court
for the District Court of Maryland Southern Division
No. AW 97-3651 — Alexander Williams, Jr. Judge

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PER CURIAM- Decided May 12,2000

Ming-Chiang Li appeals the district court's order granting summary judgment to representatives of his prior employer, the Department of the Navy, and dismissing his employment discrimination complaint. We have reviewed the record and the district court's memorandum opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Li v. Dalton, No. CA-97-3651-AW (D. Md. July 28, 1999). We deny Appellees' motion to dismiss and Li's motion on scheduling. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No.: 99-1943

MING-CHIANG LI,
*Plaintiff-Appellant*

*v.*

JOHN H. DALTON, and
DEPARTMENT OF NAVY
Defendants-Appellees.

ORDER

(FILED June 29, 2000)

The Appellant has filed an untimely petition for rehearing and rehearing en banc. This court strictly enforces the time limits for filing petition for rehearing and rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc as untimely filed.

For the Court - by direction

/s/ Patricia S. Conner

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CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT
OF MARYLAND SOUTHERN DIVISION

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Civil Action No.: AW 97-3651

MING-CHIANG LI,
*Plaintiff*

*v.*

JOHN H. DALTON, and
DEPARTMENT OF NAVY
Defendants

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District Court Judge: Alexander Williams, Jr.

MEMORANDUM OPINION

I

Presently before the Court are Defendants' Motion to Dismiss and for Summary Judgment, Plaintiff's Motion to Extend Time to File Response, and Plaintiff's Motion to Deny. A hearing was held on this motion on July 26, 1999. In ruling on the motion, the Court has considered the briefs of the parties, the arguments of counsel at the hearing in open court, and the entire record. For the reasons stated in open court and for reasons that will follow the Court will grant Defendants' Motion for Summary Judgment[1] and deny Plaintiff's motions.

II

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[1]As the Court has considered the entire record and not just the pleadings, the Court will. deny Defendants' Motion to Dismiss as moot.

Plaintiff, Dr. Ming-Chiang Li ("Dr. Li"), has a Ph.D. in Physics. Defendants are John H. Dalton in his official capacity as Secretary of the Navy, and the Department of the Navy ("Agency") itself. Plaintiff is a former employee of the Navy, having resigned his GM-13 Senior Scientist position at the Naval Research Laboratory (NRL) on October 31, 1994. Plaintiff was hired to work as a GS-13 Physicist in the Airborne Electronic Warfare Systems Branch of NRL in October of 1984. In 1988, Dr. Frank Klemm ("Dr. Klemm"), Head of the Offboard Countermeasures Branch, the parent organization to the Radar Cross Section Measurement (RCS Measurement Facility) at the Chesapeake Bay Detachment of NRL asked Dr. Li if he was interested in transferring to the RCS Measurement Facility as head of the facility. The facility had been operated by a GS-12 technician and a GS-8 computer operator, but the technician had left.

Dr. Li alleges that Dr. Klemm promised him that if he transferred he would be promoted to the GM-14 grade. Dr. Li states that Dr. Klemm told him that Klemm would submit the paperwork for the creation of a facility manager position, for which he could compete. They also discussed the possibility of hiring more support staff, and allowing Dr. Li to complete research that he already had begun even though it was not within the Facility's mission. Dr. Li accepted the position as a GM-13 Senior Scientist at the RCS Measurement Facility on November 10, 1988.

The GM-14 facility manager position was never created. Dr. Klemm submitted a description, but Dr. John Montgomery ("Dr. Montgomery") denied his request to create the position. Dr. Montgomery believed that the position was too similar to the GM-13 position occupied by Li and "without a larger staff to be managed, that position could not justify the increase in grade." Defendant's Initial Motion at 7.

During the 1988-89 year, Dr. Li received a level "4" exceeds fully successful performance rating for his work at the RCS Measurement Facility. Dr. Klemm twice recommended him for a promotion, and Dr. Montgomery approved the recommendations. Due to the highly competitive nature of the NRL only a few promotions were given per year. Dr. Li was not promoted.

As part of his duties, Dr. Li was required to seek funding for the facility. According to Defendants, Dr. Li continued to attempt to solicit funding for projects outside his mission area, alter Dr. Klemm expressly told him not to and Dr. Klemm reprimanded Dr. Li. Dr. Li filled an administrative grievance which was denied. Dr. Li was later suspended for failure to follow an order to provide Dr. Klemm with activity reports from July 5-July 18, 1992. Dr. Li alleges that the basis of the reprimand and the suspension was discrimination on the basis of race, national origin, and age, and retaliation. Dr. Li also alleges that the Defendants discriminated against him when they did not support articles that he wanted to publish, and would not allow hint to make a presentation at Howard University. Further, Dr. Li claims that Defendants discriminated against him because Dr. Klemm gave him a level "2" minimally successful rating, and then modified Dr. Li's Performance Management Recognition System objectives. Dr. Li alleges that this modification reduced him to the status of a technician. Dr. Li contends he was forced to resign due to the discrimination he faced.

Plaintiff filed four complaints with the Equal Employment Opportunity Commission. A hearing was held on those complaints on February 3, 1994 before an administrative law judge ("ALJ"). The ALJ found no discrimination or reprisal. The Agency issued its Final Agency's Decision on April 6, 1994. The Agency adopted the ALJ's findings and conclusions. After the EEOC Office of Federal Operations affirmed the Agency's

Decision and denied Dr. Li's request for reconsideration, he filed the instant suit.

Plaintiff filed an amended complaint after the Court dismissed his original complaint. The Defendant filed a motion to dismiss which was granted as to all counts, except two. Plaintiff's failure to promote and retaliation claims survived the original motion to dismiss. After a rather difficult discovery process, in which Plaintiff filed many motions which were denied by Magistrate Judge Charles B. Day, the time for discovery is now closed.

III

Defendants now move for summary judgment. Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c): Anderson v. Liberty Lobby, Inc., 477 U.S. 242,250 (1986). The evidence of the non-movant is to be believed and all justifiable inferences drawn in her favor, but a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. Runnebaun v. Nationsbank of Md., N.A., 123 F.3d 156, 164 (4th Cir. 1997) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242,255 (1986); Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citations omitted).

Defendants argue that "[t]he true root of Plaintiffs complaints is, as he said in the hearing before this Court on the initial dispositive motion, "they denied nay right as a scientist to conduct research and also to grant my award for my accomplishment." Memorandum in Support at 3. According to Defendants, these complaints do not stem from discrimination.

In an action where, as here, the plaintiff relies upon circumstantial evidence to prove that an illicit criterion motivated the employer to take an adverse employment action, the parties' respective burdens are identified by the three-step proof scheme articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff must establish a prima facie case of discrimination by the preponderance of the evidence. See Hatperin v. Abacus Tech. Corp., 128 F.3d 191, 196 (4th Cir. 1997). Defendant then must articulate a legitimate, nondiscriminatory reason for the adverse employment action. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248,254 (1981). If Defendant can produce such a reason, Plaintiff must then demonstrate that that reason is false and that the real reason was unlawful discrimination. See Vaughan v. Metralnealth Co., Inc., 145 F.3d 197, 201-02 (4th Cir. 1998). Plaintiff "must do more than merely raise a jury question about the veracity of the employer's proffered justification... [P]laintiff must have developed some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action." Gillins v. Berkeley Electric Coop.,Inc., 148 F.3d 413,417 (4th Cir. 1998).

To establish a prima facie case of failure to promote under the Title VII, Plaintiff must show (1) he is a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position in question; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. Evans v. Technologies Applications & Scrv. Co., 80 f.3d 954, 959-60 (4th Cir. 1996).

Plaintiff makes two allegations regarding Defendant's failure to promote him: (1) he was not promoted into a new position as promised by Dr. Frank Klemm upon his transfer, and (2) he was not promoted thereafter. The record reveals that Dr. Klemm requested that a new position be created for which Plaintiff could compete,

however tine position was not created. Therefore, Plaintiff cannot establish that he applied for a position in question, that he was qualified for the position in question or that he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. Therefore, Plaintiff cannot establish a prima facie case of failure to promote under the Title VII for his first allegation.

Secondly, even if Plaintiff could establish a prima facie case for his second allegation, he has not produced any evidence to rebut Defendants' legitimate non-discriminatory reasons for the failure to increase his grade level from a GM-13 to a GM-14. Dr. Klemm testified at the administrative hearing that he had not promised Plaintiff a promotion to GM-14 and that he did not have the authority to do so. He also testified that Dr. Montgomery decided that not to create a Facility mzmager position at that level, because he believed that the position was too similar to the GM-13 position occupied by Dr. Li. Dr. Klemm further testified that he recommended the Plaintiff for promotions in both 1989 and 1990, but did not do so after 1990, because of Dr. Li deteriorating performance. Dr. Montgomery explained that due to the highly competitive nature of NRL, Dr. Li was not able to receive one of the few promotions available each year. Plaintiff has not produced any evidence to rebut these articulated reasons. Therefore, Defendants are entitled to summary judgment on the failure to promote claim.

IV

Defendants are entitled to summary judgment on the retaliation claim as well. To establish a prima facie case of retaliation, an employee must show that: 1) he engaged in protected activity; 2) the employer took an adverse employment action against the employee; and 3) a casual connection existed between the protected activity and the adverse action. Carter v. Ball, 33 F. 3d 450 (4th

Cir. 1994). Plaintiff alleges that he suffered three adverse employment actions: ( I ) there was a delay and a refusal to resolve his grievance, (2) he was downgraded to the status of a technician, and (3) he was subjected to a hostile environment. The record demonstrates that Plaintiffs grievance was resolved, and that any delay in resolving the grievance resulted from the Plaintiffs own conduct.[2]

Further, Plaintiffs second argument, that he was downgraded to the status of a technician is based on his 1992-1993 performance plan, not a change in his grade level. Adverse employment actions do not include "interlocutory or mediate decisions [which] hav[e] no immediate effect upon employment conditions." Page v. Bolger, 645 F. 2d 227,233 (4th Cir. 1981). The issuance of a performance plan is such a decision. Moreover, Li has not rebutted Defendants legitimate non-discriminatory reasons for the change in the plan. Dr. Klemm testified at the administrative hearing that the level of work on the plan did not limit Li to the status of a technician, and that Li maintained the same type of responsibilities as he had before the revised plan. Further, Dr. Klemm stated that the plan was only modified so as to provide more guidance as to what the position entailed. This was necessary because "Plaintiff had repeatedly failed to provide information required in response to internal requests and.., did not exhibit sufficient knowledge and understanding of the finances of his own organization, thereby placing that organization in fiscal jeopardy." Memorandum in Support at 13. Plaintiff has not produced any evidence to rebut these articulated reasons.

To make a hostile environment claim in the Title VII context, Plaintiff must demonstrate that the conditions

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[2] Plaintiff included Title VII allegations which were not covered by the Agency's grievance procedures.

were severe or pervasive enough to create art environment that a reasonable person would find hostile or abusive. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Further, Plaintiff must show that the alleged conduct altered the conditions of his working environment. See Hartsell v. Duplex Prods. Inc., 123 F.3d 766, 772-73 (4th Cir. 1997) (quoting Meritor Says. Bank v. Vinson, 477 U.S. 57, 67 (1986)). In Harris, the Supreme Court provided the following Factors for the courts to consider: the frequency of the conduct, its severity, whether it was physically threatening or humiliating (as opposed to a mere offensive utterance), and whether it interfered with the person's work performance. Harris, 510 U.S. at 23. Plaintiff's only evidence that any of the alleged conduct interfered with ability to work is his bald assertion that he was made physically ill due to the constant harassment. Further, the conduct about which Plaintiff complains, the suspension, the reprimand, and Defendants failure to allow him to publish and to make the presentation at Howard, was not severe, physically threatening or humiliating. Moreover, this conduct occurred over an extended time period, and thus cannot be considered frequent. Further, Plaintiff has not established a causal connection between any of the alleged retaliatory acts and the protected activity, beyond his mere allegations. Therefore, the Defendants are entitled to summary judgment on the retaliation claim as well.

Accordingly Defendants' Motion for Summary Judgment will be granted. Plaintiff's Motion to Extend Time to File Response, which was untimely filed, will be denied.

An order consistent with this Opinion will follow.
Date: 7-26-99

/s/ Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT
OF MARYLAND SOUTHERN DIVISION

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Civil Action No.: AW 97-3651

MING-CHIANG LI,
*Plaintiff*

*v.*

JOHN H. DALTON, and
DEPARTMENT OF NAVY
Defendants

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District Court Judge: Alexander Williams, Jr.

**ORDER**

In accordance with the Memorandum Opinion, IT IS this 26th day of July, 1999, by the United States District Court for the District of Maryland, Southern Division, hereby
ORDERED:

1. That Defendants' Motion to Dismiss [80-1] BE, and the same hereby IS, DENIED as moot;

2.That Defendants' Motion for Summary Judgment [80-2] BE, and the same hereby IS, GRANTED;

3. That Plaintiff's Motion to Extend Time to File Response [83-1] BE, and the same hereby IS, DENIED;

4. That Defendants' Oral Motion to Strike Paper 85-1 BE, and the same hereby IS, GRANTED;

5. That the Clerk of the Court CLOSE this case; and

6. That the Clerk of the Court mail copies of this Order to all parties of record.

United States District Judge
/s/ Alexander Williams, Jr.